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NO. 204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PEARL BEER DISTRIBUTING COMPANY
OF JEFFERSON COUNTY, INCORPORATED,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, THE FIFTH CIRCUIT

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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, THE FIFTH CIRCUIT

Pearl Beer Distributing Company of Jefferson County, Incorporated prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The intermediate report of the trial examiner dated May 3, 1963 (Appendix A, infra, pp. 11-36; R. 52-75) is not officially reported; the opinion of the National Relations Board, adopting it with a minor modification, entered July

11, 1963 (Appendix B, infra, pp. 37-38; R. 130-131) is reported in 143 N.L.R.B. 65. The opinion of the United States Court of Appeals entered May 1, 1964 (Appendix C, infra, pp. 39-40) is not officially reported.

JURISDICTION

The judgment of the United States Court of Appeals dated May 1, 1964 was entered May 1, 1964. No motion for rehearing was filed, and no extension of time was required to petition for certiorari. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C.A. 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the National Labor Relations Board had jurisdiction of the warehouse employees of Petitioner and Petitioner, a local beer distributor, not engaged in commerce, nor in the production of goods for commerce, and whose operations did not affect commerce and did not meet the Board's jurisdictional requirements, because, three years prior thereto, the Petitioner and other beer distributors, some of whose businesses did satisfy the Board's standards, bargained with the Beer Salesmen of the Sabine District Union, over wages, hours and working conditions of their respective driver-salesmen (and no warehousemen) and signed an individual contract with said union covering a single unit of its driver-salesmen.

STATUTES AND REGULATIONS INVOLVED

The following statutory provisions are set forth in Appendix D, infra, pp. 40-43; Section 2(6), (7), (9) of the National Labor Relations Act, 29 U.S.C.A. 152(6), (7),

(9). The National Labor Relations Board's jurisdictional standards prevailing in 1962 is copied in Appendix E, infra, pp. 44-47.

STATEMENT OF THE CASE

Petitioner is a Texas corporation with its sole place of business at 4713 Port Arthur Road, Beaumont, Texas. (J.A. 71) It is engaged in the business of a local beer distributor. It buys beer from the Pearl Brewery in San Antonio, Texas and sells it to retailers in Hardin, Jefferson and Orange Counties, Texas. It does not import any beer into Texas, and it does not export any beer from Texas; all of its purchases and sales are made within the State of Texas. (J.A. 72) It does not satisfy the Board's jurisdictional standards. (R. 54)

Approximately three years prior to the alleged acts and omissions made the basis of the complaint, Petitioner and other beer distributors, some of whom met the Board's jurisdictional requirements, bargained with the Beer Salesmen of the Sabine District Union, over wages, hours and working conditions of their respective driver-salesmen (and no warehousemen) and it signed an individual contract with said union covering a single unit of its driver-salesmen, a term of three years. (R. 38, sec. 3b; 44 sec. 3b) The trial examiner concluded from such facts that the Board had jurisdiction over Petitioner and its warehousemen (R. 54) and which conclusion the Board adopted. (R. 130-131)

Petitioner was a member of the Sabine Dist Wholesale Beer Distributors Association. There were never any negotiations between said association and any union, and there was never any labor contract made by the associa-

tion. Petitioner, as sole employer, made the individual contract with said union, covering only its driver-salesmen which contract expired December 31, 1962. (J.A. 74-75)

During the term of said contract, the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, and its local No. 258, petitioned the National Labor Relations Board for recognition and certification as the sole and exclusive bargaining agency of all drivers, helpers and warehousemen employed by the members of the Sabine District Wholesale Beer Distributors Association, Inc.; the same was assigned No. 23-RC-1930. Petitioner and the other members of said association denied the allegations and further contended that such a proposed unit was inappropriate. The Board, through its Regional Director, Clifford W. Potter on September 21, 1962 held that the proposed unit was not appropriate, because it included warehousemen, their interest being diverse from those of the driver-salesmen, and that a unit of driver-salesmen and helpers was appropriate, a copy of said report is attached hereto as Appendix F, infra, pp. 48-56. The charging union acquiesced in the decision of the Regional Director, but Petitioner and the other beer distributors did not; they appealed the whole matter to the Board, and the Board decided on April 23, 1963 that there were two appropriate units: (1) driver-salesmen and (2) helpers, and again completely eliminated the warehousemen. A copy of said decision is attached hereto marked Appendix G, infra, pp. 57-62.

The instant complaint was originated on July 23, 1962, by James C. Chandler as representative of said brewery union, alleging that petitioner had coerced, threatened and

interfered with its warehouse employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act, and that Petitioner had terminated the employment of the warehouseman Albert Sells because of his activities in the local union. Petitioner denied that the Board had jurisdiction over it, its warehousemen, the complaint and the charges made. (R. 43-48) The trial examiner held that the Board had jurisdiction over Petitioner, its warehousemen, and the complaint. (R. 52-72; Appendix A, infra, pp. 13-14) to which Petitioner duly excepted (R. 78-129). The Board overruled Petitioner's exceptions and adopted the findings, conclusions and recommendations (except for a minor and not relevant item) of the trial examiner (R. 130-131, Appendix B, infra, p. 38) Petitioner under the Act appealed to the United States Court of Appeals, Fifth Circuit, and it affirmed the decision of the Board in a per curiam opinion, saying "we cannot say that the Board erred in asserting jurisdiction". (Appendix C, infra, p. 40.

REASONS FOR GRANTING THE WRIT

The alleged "labor" dispute was not one that would tend to burden, obstruct, or, in general "affect" interstate or foreign commerce as such terms are defined in Section 2(6), (7) and (9) of the National Labor Relations Act, as amended. Petitioner denied that it "is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act." (R. 39, 45) The burden was then cast upon the General Counsel to prove affirmatively, by a preponderance of the evidence, the substantial facts alleged in the complaint, and included jurisdiction and coverage of Petitioner and its warehouse

employees. Section 7(c) of the Administrative Procedure Act, 5 U.S.C.A. 1006(c); *Rubin Bros. Footwear*, 99 N.L.R.B. 610; *Local No. 3 Packinghouse Workers, CIO v. N.L.R.B.* (8th 210 F.2d 325; *N.L.R.B. v. Mac Smith Co.* (5th) 203 F.2d 868, 871, where Judge Hutcheson said:

> * * * "An examination of the record upon the correct principle that the burden was upon the Board to make out its case and not as the Board seems to think, upon the respondent to defend itself, shows that there is no basis in the record for the findings of the examiner and the order based thereon."

If a labor dispute did exist, which obstructed, or in general affected commerce, the Board would not accept jurisdiction of Petitioner and its warehouse employees, unless Petitioner's interstate or foreign commerce met a certain dollar volume. The trial examiner did not apply Section 2(6), (7) and (9) of the Act to determine jurisdiction; he assumed that such a "labor" dispute did in fact exist, and that it affected commerce. Petitioner's purchases and sales in interstate or foreign commerce did not meet the dollar volume jurisdictional requirements of the Board. The trial examiner applied the Board's jurisdictional yardstick to the other employers who had participated with Petitioner in bargaining with the Beer Salesmen of the Sabine District for individual contracts covering their respective units of driver-salesmen exclusively and determined that the out of state purchases of such other employers were in excess of $50,000 annually (R. 54). He concluded that since Petitioner had prior thereto negotiated with said other employers an individual contract with the Beer Salesmen of the Sabine District, covering exclusively an individual unit of driver-salesmen that the

Board had jurisdiction of Petitioner and its warehouse employees. (R. 54-55)

The trial examiner did not consider the Board's holding in 23-RC-1930 that a unit of driver-salesmen helpers and warehousemen was not appropriate because such unit included warehousemen whose interest was diverse from those of the driver-salesmen. (Appendix F, infra, pp. 48-56) The Board has consistently held that it will not take jurisdiction over an intrastate employer and his employees in such a case. *Kenosha Liquor Co.* (1954), 104 N.L.R.B. 189; *Administrative Decision of General Counsel*, Case No. S.R. 1594—where a multi-employer unit is inappropriate, the jurisdiction of the Board depends upon the individual employer's interstate transactions and not upon the combined totals of all the employers. *Administrative Decision of General Counsel*, Case No. S.R. 1594.

Petitioner, whose operations, in whole or in part, do not affect commerce, could have and now can, withdraw from multi-employer bargaining for a labor contract covering only driver-salesmen and driver-salesmen exclusively. Upon such withdrawal and abandonment, it and its driver-salesmen would not be subject to the jurisdiction of the Board. *Administrative Decision of General Counsel* (1954), Case No. 1103; *Johnson Optical Co.* (1949), 87 N.L.R.B. 539.

The authorities cited by the trial examiner to support his jurisdictional position—*Siemons Mailing Service*, 122 N.L.R.B. 81, 84; *Westside Market Owners Association*, 126 N.L.R.B. 167, 170; *Belleville Employing Printers*, 122 N.L.R.B. 350, 352; *Sightseeing Guide and Lecturers Union*, Local 20076, 310 F.2d 40, 42—involve completely different factual situations. In addition to the distinctions hereinbefore impliedly pointed out, there is another im-

portant one: All of such cases relate to an employer and his employees who were in, or a member of, an employee unit, which had been the subject of multi-employer bargaining and members of an appropriate unit. In the instant case, Petitioner and its warehousemen never engaged in collective bargaining with other employers covering a unit in which the warehouse employees were appropriate, and were included. Such authorities do not hold that an individual local intrastate business which bargains with another interstate employer or employers, over wages, hours and working conditions of certain specific employees in an appropriate unit, submits itself and its remaining employees to the jurisdiction of the Board, particularly when the remaining employees make it an inappropriate unit.

The two major objectives of the Act are the promotion of industrial peace and the facilitating of wage adjustments by bolstering, through encouragement of the growth of collective-bargaining power, the position of the isolated wage earner caught in the complex of modern industrialism. It is still the national policy to promote industrial peace "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and "designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." The decision of the Board, affirmed by the Court of Appeals will discourage local employers, who are not engaged in commerce and whose operations do not affect commerce, and also those employers who do not meet the jurisdictional yardstick of the Board, in bargaining with other employers covered by the Act, with a union representing their respec-

tive class of employees in an appropriate unit. Such local employers will prefer either to bargain individually with a union representing their employees in an appropriate unit, or team up with other local employers, under local state law. If the decision of the Board is permitted to stand and is the law, Petitioner will no doubt withdraw from multi-employer bargaining with employers whose operations affect commerce, at the expiration of its present contract covering its driver-salesmen, and upon such withdrawal it will no longer be covered by the Act and it will no longer be under the jurisdiction of the Board, and the rights and remedies of the driver-salesmen, helpers, warehousemen and all other employees will be determined by local law. Neither of such results are in conformity with the national labor policy; both are in opposition thereto.

CONCLUSION

To secure the objectives of the Act, to carry out the national labor policy, and to encourage the practice and procedure of local employers whose individual operations do not affect commerce, to join other employers having operations that do affect commerce, and to bargain collectively with representatives of their respective employees in an appropriate unit or units, under the National Labor Relations Act, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IR-224-63
Beaumont, Tex.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 23-CA-1460

PEARL BEER DISTRIBUTING COMPANY OF JEFFERSON COUNTY, INCORPORATED

and

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO

Case No. 23-CA 1510

PEARL BEER DISTRIBUTING COMPANY OF JEFFERSON COUNTY, INCORPORATED

and

BEER DRIVERS LOCAL 253, AFL-CIO, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO

Barry A. Karp, Esq., of Houston, Tex., for the General Counsel.
John H. Benckenstein, Esq., of Beaumont, Tex., for the Respondent.
Mr. James C. Chandler, of Beaumont, Tex., International Representative of the Brewery Workers.

Before: Robert E. Mullin, Trial Examiner.

INTERMEDIATE REPORT

Statement of the Case

This proceeding, brought under Section 10(b) of the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act, was heard in Beaumont, Texas, on February 6 and 7, 1963, pursuant to due notice to all parties. The complaint issued by the General Counsel of the National Labor Relations Board, and based on charges duly filed and served, alleged that the Respondent had engaged in unfair labor practices proscribed by Section 8(a)(1) and (3) of the Act. In its answer, duly filed, the Respondent conceded certain facts with respect to its business operations, but denied that it was engaged in commerce within the meaning of the Act or that it had committed any unfair labor practices.

At the hearing all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence and to argue orally. The parties waived oral argument. Subsequent to the hearing, able briefs were submitted by both the General Counsel and the Respondent. These have been fully considered.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondent

The Respondent is a Texas corporation with its principal office and warehouse in Beaumont, Texas, where it is engaged in the operation of a beer wholesaling distributorship. During the 12 months prior to the issuance of the complaint, a representative period, it sold and distributed prod-

ucts the gross value of which exceeded $500,000. At all times material herein the Respondent has been a member of a multiemployer bargaining group whose members participate in multiemployer bargaining negotiations. This latter group, at all times material herein, has conducted bargaining negotiations on behalf of its employer members. During the 12-month period referred to above, one or more of the members of the said multiemployer bargaining group purchased in excess of $50,000 worth of beer which product originated and was shipped from points outside the State of Texas directly to said member or members. The foregoing findings are based on the concessions which the Respondent made in its answer. On the other hand, the Respondent denied that it is engaged in commerce within the meaning of the Act.

Although the Respondent, by itself, does not appear to meet the Board's standards for the assertion of jurisdiction, the contrary is true of those members of the multi-employer bargaining group which had out-of-State purchases in excess of $50,000 annually. *Siemons Mailing Service*, 122 NLRB 81, 84. Moreover, in *Westside Market Owners Association*, 126 NLRB 167, 170, the Board held that it would assert juridiction over a multiemployer association, *or the individual members*, if the total annual volume of gross business of all members met the necessary amount set for the Board's minimum jurisdictional standard, and legal jurisdiction existed over one or more members of the association. *Belleville Employing Printers*, 122 NLRB 350, 352. Both of these standards are met in the present instance. As found above, in its answer the Respondent conceded that it participated in the multiemployer negotiations of the aforesaid bargaining group. In *Siemons*, the Board held

that it would adhere to its past practice of "considering all members of multiemployer associations who participate in . . . multiemployer bargaining negotiations as single employers for jurisdictional purposes." *Idem*; see also *N.L.R.B. v. Sightseeing Guides and Lecturers Union Local 20076*, 310 F.2d 40, 42 (C.A. 2). On the basis of the foregoing, it is my conclusion and I find that the Respondent is engaged in commerce within the meaning of the Act.

II. The labor organizations involved

Beer Drivers Local 253, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, herein called Local 253, and International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, herein called Brewery Workers, are labor organizations within the meaning of the Act.

III. The alleged unfair labor practices

During the summer and fall of 1962 the Respondent had approximately 26 employees. According to Hunter Miller, president and general manager, this number included 9 driver-salesmen and 4 warehouse employees, as well as administrative and clerical employees and sales personnel. For many years the driver-salesmen have been represented by an independent union known as "Beer Salesmen of the Sabine District" (herein called Independent). Mr. Miller testified that the Respondent has had contractual relations with Independent for about 15 years, although at the time of the hearing, no contract was in effect. According to the Respondent's president, the last contract, which covered a term of 3 years, expired on December 31, 1962, and has

not been renewed pending the outcome of a representation matter.[1]

Prior to July 1962, the Respondent's warehouse employees were unorganized. Early that month James Chandler contacted several of them, and secured authorization cards on behalf of the Brewery Workers. When information as to this organizational movement reached M. J. Hyatt, foreman of the warehouse, he made it clear to the employees under him that he strongly disapproved. Albert Sells, one of the warehouse employees, testified that in mid-July he asked Hyatt "his opinion of what I should do concerning the union conflict they had at the Company. . . . And he told me if I wanted him to tell me, it would be better to keep my nose out of it completely and don't become involved."[2] Other witnesses testified that a short while later Foreman Hyatt went much further than merely to offer his opinion as to what the employees should do. Thus, Oris Granger testified that on about July 18, while all of the warehouse employees were present, Hyatt stated "You know you all made a mistake by joining the AFL-CIO Union. You are not cooperating with the Company, neither with the truckdrivers. . . . I am going over to suggest to Mr. Miller about ten dollars be cut off your pay." According to Granger, later that same day and as they were about to conclude the shift, Hyatt reminded them of his earlier statement and told them "be careful how you spend your money. You know you are going to have ten dollars cut out of your check." Granger and

[1] Namely, **Sabine District Wholesale Beer Distributors Association, Inc.**, Case No. 23-CA-1930.

[2] This testimony was credible, and it was not denied by Hyatt.

another warehouse employee, Wilbert Vaughn, testified that during the course of that same day Hyatt warned them that if they stayed in the "AFL-CIO Union" the Company "could easily find a reason for firing us. If we dropped a case of beer or busted it . . . they would make us cut grass, clean up around the place, and make it so hard on us we would have to quit."[3]

The Respondent's warehouse employees wore uniforms, for some of which the Employer paid.[4] Granger testified that on July 18, Hyatt told him and the other employees in the warehouse that "if we remained in the Union we were going to get our uniforms taken away from us; we would have to pay for them," that the employees would lose sick leave and vacations and that the Company "would cut every man in the AFL-CIO."

The initial charge in Case No. 23-CA-1460 was filed by Chandler on July 23, 1962. Preparatory to filing the charge the representative of the Brewery Workers secured statements from several of the employees, including Granger. The latter testified that prior to this time, Hyatt had occasionally loaned him money. According to Granger, however, after he signed the statement, Hyatt refused to lend him any money, and, in declining, told him "You know why, because you signed a statement against me." During this period the foreman also told this same employee that "every day he has to spend in court he would see [the employees]

[3] The quotation is from the testimony of Granger.

[4] Mr. Miller testified that the Respondent paid for the uniforms of only those employees who had been working for 6 months or more.

got two days off without pay."[5] Clifton Rideaux, another warehouse employee, testified that he likewise heard Hyatt make the latter remark.

Early in October the Independent began a campaign to enlist the support of the warehouse employees. On about October 3, Hyatt and one of the truckdrivers, Sam Fertita, told the warehouse employees that they had heard that Mr. Chandler, the representative of the Brewery Workers, had withdrawn his request for an election on their behalf and that Chandler would have nothing further to do with them.[6] Immediately thereafter the four warehouse employees, Albert Sells, Wilbert Vaughn, Oris Granger and Clifton Rideaux, asked Mr. Miller if they could meet with him. When the general manager agreed to do so, they told him of the report which Hyatt had given them about the Brewery Workers and asked him for his advice. Mr. Miller testified that the employees told him on this occasion that they wanted to know if he could help them get out of the AFL-CIO and into the Independent. According to Miller, he told them that there was nothing he could do to help or hinder them in a matter of this kind, but that he would assist them in any way that was legal, honorable and ethical. Sells testified that during the course of the meeting, Mr. Miller told them that the conflict between the Brewery Workers and the Independent could be tied

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[5] The quotation is from the credible, undenied testimony of Granger. Hyatt conceded that he had made such a threat to the employees as to what they might anticipate in the event the union problem compelled him to make any court appearances.

[6] This finding is based on the credible testimony of Albert Sells. It was undenied by Hyatt.

up in the courts for several years and that he would like to see all the employees in one union.[7]

Shortly after the meeting in Miller's office, Vaughn and Granger signed cards in the Independent. Sells, however, refused to do so when he was solicited. Prior to the end of the shift that same day, Hyatt approached Sells and, according to Sells' testimony which Hyatt did not deny, the following conversation ensued:

> [Hyatt said] Al, what in the . . . is wrong with you? I asked him what did he mean. He told me I was all fired up that morning, talking with Mr. Miller about joining the Independent Union, and now that all the men were there I didn't want to sign the papers. I told him I hadn't had time to think about it. He told me it was getting close to the slack season and pretty soon he would have to let me go, and since I was the latest addition to the warehouse crew, more than likely it would be me. . . . I told him I didn't care if it did mean giving up my job, I would not sign the card . . . he told me it wasn't meant to be a threat but he would like for me to think about what he had said.

There was testimony about another incident which occurred during this same period when Mr. Miller donated a sum of money for coffee and sandwiches for the men.[8]

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[7] Mr. Miller testified that he could not remember having made any statement about the union conflict being the matter of extended litigation. The latter portion of Sells' testimony as to the general manager's preference for one union instead of two was not denied.

[8] Mr. Miller testified that during the World Series of 1962 he had, on one occasion, won the baseball pool which the employees had started, and that he turned the entire amount of his winnings, a total of $18, over to the warehouse foreman to provide coffee and sandwiches for the men as long as the money lasted.

The warehouse employees testified that in announcing the gift Hyatt suggested that it was a reward for deserting the Brewery Workers. Thus, Wilbert Vaughn testified that on this occasion Hyatt explained that they were getting the coffee money "Maybe because you all went back to the Independent Union." Oris Granger testified that one morning a short time later and after he and others had attended a meeting sponsored by the Brewery Workers, the coffee truck arrived and he declined to order any. At that point, according to the employee, Hyatt asked, "Why, your conscience bothering you?" According to Granger, when he denied any problems of conscience in this regard, Hyatt stated, "Yeah, I know you went to the meeting last night . . . because I've got a guy over there—he calls me and told me about it . . ." Granger's testimony was corroborated by Vaughn. Although Hyatt testified that he spent the coffeee money without discrimination, he did not deny the comments attributed to him by the employees which have been set forth above.

On October 12, 1962, Local 253 filed the initial charge in Case No. 23-CA-1510. On about November 8, Hyatt was away from the warehouse for some while. Clifton Rideaux testified, and his testimony in this respect was not denied, that before Foreman Hyatt left, "He told me he had to go down and talk to the Labor Board man; when he got back things wasn't going to be the same." That evening when Hyatt returned, the warehouse employees were put to work washing windows and cutting the grass around the building before they could unload any of the trucks which arrived. Since they were paid a weekly rather than an hourly wage, and were required to stay at the warehouse until all the trucks were unloaded, that particu-

lar evening they were on duty until about 8 p.m. Albert Sells testified that in a conversation that evening with Rideaux, his coworker, they discussed the amount of extra work they were doing and he proposed that they contact Chandler, the Brewery Workers representative, about their treatment. Rideaux, however, disagreed and commented that he felt they had already signed too many statements. At this point, according to Sells, the two employees discontinued their conversation when they observed that Hyatt was standing nearby.

Clifton Rideaux testified that on the following morning, he came to work with an injured hand and that about 8:30 or 9 a.m., Hyatt came to him and asked whether his hand had recovered enough so that he could move cases of beer. According to Rideaux, when he answered the foreman in the affirmative, Hyatt told him that he was "going to cut Albert [Sells] loose . . . he thought Al was the brains of the AFL-CIO."[9] Later that morning, Sells was terminated.

The hearing in this case began on February 6, 1963. Orl. Granger testified that Wilbert Vaughn apprised Hyatt of the fact that he and the other warehouse employees had been subpoenaed to testify at the hearing. According to Granger, while he was at work on February 5, a man approached him and inquired as to the prospects of employment in the warehouse. Granger testified that he referred the individual to Hyatt who was standing nearby. Thereafter, according to Granger, while he and his coworkers Rideaux and Anderson were present, Hyatt told

[9] Rideaux's testimony as to this conversation was credible and it was not denied by Hyatt.

the job seeker, "We don't need anybody right now but you better give me your name and address because we might run these boys off tomorrow." Granger's testimony as to this incident was credible and it was not denied or contradicted by the foreman when he was on the stand.

At the hearing, Hyatt frankly conceded that he had told the employees that each of them would lose a day's work for every day they caused him to spend in court because of their organizational activities. Foreman Hyatt, however, generally denied that he had ever threatened the employees with a cut in wages, or the deprivation of benefits or that he had warned them not to join the AFL-CIO. On the other hand, when asked the following questions he gave the answers which appear below:

> Q. Mr. Hyatt, did you ever state to any of the warehousemen what you thought about any union. . . .?
> A. Oh, I probably did.
> Q. You discussed the merits of the Union?
> A. Well, I told them, frankly, I didn't think too much of any of them.

In a prehearing affidavit which Hyatt attested on November 9, 1962, he averred that he had "never discussed the merits of any union with the warehousemen who work for me." In an earlier statement, however, which Hyatt attested on August 21, 1962, he conceded that he had had a number of discussions on this subject with the men. Thus, in the latter affidavit, Hyatt averred:

> [On] various occasions employes of the warehouse at the Company would come to me asking my opinion of unions and on the Brewery Workers, AFL-CIO

> Union. At these times I would tell them just how I felt in my opinion. I had told them for instance if it were my business and I owned it—I would eliminate paid vacations, no uniforms and other benefits, rather than have some outsider tell me how to run my business.

During the course of his testimony at the hearing, Hyatt also stated that after an occasion in 1962 when Mr. Miller had gone to the Labor Board office in Houston "I haven't opened my mouth to the boys about anything." As noted earlier, a number of the statements set out above which the employees attributed to Hyatt were never denied or contradicted by him when on the stand. As a result, it is my conclusion, on the basis of the foregoing, as well as his demeanor as a witness, that during the months after the Brewery Workers initiated their campaign, Foreman Hyatt was very outspoken in his opposition to this movement among the employees. It is my further conclusion that the testimony of Sells, Granger, Rideaux and Vaughn as to specific conversations with Hyatt is the more credible than the general denials of the latter that he had ever made such statements as they attributed to him. At the hearing and in its brief, the Respondent contended that insofar as Hyatt had made any statements in derogation of the employees' rights under the Act, the statements were unauthorized and the Company should not be held responsible for them. There was no evidence, however, that the management had ever made any effort to communicate this disavowal to the employees. Consequently it is my conclusion that the Respondent must be held liable for the actions and conduct of Foreman Hyatt as found above.

A. *The Termination of Albert Sells*

The General Counsel contends that Sells was discriminatorily dismissed on November 9, 1962. The Respondent denies the allegation and asserts that Sells was terminated solely because lack of business required that one warehouse worker be laid off and, that Sells was selected because he was a temporary employee with less seniority than any other worker.

Sells was originally hired in June 1962, as a temporary employee to take the place of an employee named Anderson who was off duty because of an injury. When the latter returned to work after about a week, Sells was laid off for 2 days. When Sells returned to the Company to secure his paycheck, Hyatt told him that if he wanted further employment with the Company he could return on the following Monday and go to work. *Sells testified, and his testimony in this regard was not contradicted, that about a month later Hyatt promised him that he would speak to Mr. Miller about putting him on as a regular employee on a permanent basis.* The other warehouse employees had a license from the State Beverage Control Board to deliver beer. According to Sells, on numerous occasions throughout the summer, Hyatt told him that the Company would have to get his license for him. Notwithstanding the fact that Sells did not have such a license, in a few instances, he was ordered to deliver beer to customers.[10]

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[10] This finding is based on Sells' undenied, uncontradicted testimony. Mr. Miller conceded that it was possible that Sells had delivered "some beer."

As found above, when the Brewery Workers first began their campaign, Sells asked Hyatt his opinion of the matter and the foreman advised him to keep his "nose out of it completely and don't become involved." Notwithstanding this advice from his supervisor, on July 19, Sells signed an authorization card and thereafter he actively solicited his coworkers to support that Union. Late in September or early in October he was appointed a trustee of Local 253. Early in October, when Hyatt and one of the truck-drivers told the warehouse employees that at a meeting of the Independent Union the drivers heard the Brewery Workers and Chandler would no longer represent the warehousemen, Sells and his coworkers sought a meeting with Mr. Miller.

Earlier I have found that at this meeting, held on October 3, the employees in the warehouse discussed with Mr. Miller the alternatives which they had if they wanted to withdraw from the Brewery Workers and join the Independent. Sells also testified that shortly after this meeting Mr. Miller gave him two copies of an application form for permanent employment and asked that he fill out the form immediately. The General Counsel contends that at this point the Respondent planned to take Sells on as a permanent employee and would have done so had he not remained faithful to the Brewery Workers. This is denied by the Respondent. The facts as to this issue will now be considered.

During the course of the meeting between the employees and Miller on October 3, it is undisputed that the Respondent's president asked the men whether any of them had a high school diploma, that Sells stated that he was

a high school graduate, and that Mr. Miller then proposed that he might be able to help Sells continue his education at Lamar Tech.[11] According to Mr. Miller, the only purpose in asking that Sells, a young man, fill out the application forms was to secure background information to determine whether the Respondent could help the employee continue his education. Further, according to Miller, when Sells turned in the completed application he learned, for the first time, that the employee had a wife and children so that it was obviously impossible to help with any further schooling since all other employees when the Company had assisted were unmarried.

Mr. Miller was an intelligent and, in many respects, a very frank witness. On the other hand, I cannot believe that his only purpose in asking Sells to fill out the permanent application form was to secure such elementary information as to whether the man was married and had children. Such data could have been obtained by asking the man a single question at the original meeting. Moreover, it does not seem reasonable to presume that Miller would have been interested in assisting Sells to attend college if, as the Respondent now argues, Sells was then only a temporary employee whom it proposed to lay off within a few weeks when business declined. The meeting had been initiated by the employees from the warehouse crew who had heard from Hyatt that they were being abandoned by the Brewery Workers. The employees present could assume that only the Independent Union remained and in his discussion with the warehouse workers at this time Miller stated his desire that all of the em-

[11] Lamar State College of Technology, located in Beaumont, Texas

ployees be in one union. Earlier herein, I have found that after Miller met with the men, Vaughn and Granger, two of the employees present at the meeting, deserted the Brewery Workers and signed cards in the Independent. Sells, when solicited to follow the same course, refused. Later, on the evening of October 3, Foreman Hyatt admonished Sells for adopting this attitude after having been "all fired up that morning, talking with Mr. Miller about joining the Independent Union. . . ." As found earlier herein, Hyatt concluded the conversation by telling the employee that, although he did not mean it as a threat, he wanted Sells to know that with the approach of the slack season he might have to lay him off since Sells was the last addition to the warehouse crew. Sells remained adamant, however, and stated that he would not sign a card in the Independent even if it meant relinquishing his job.

In the light of the foregoing, I find that, contrary to Mr. Miller's testimony, the Respondent's objective in suggesting that the employee fill out the application form in question was not to get background information on a temporary worker who would shortly be off the payroll. At the time it appeared to the Respondent that Sells and his coworkers were about to leave the Brewery Workers. *It is my conclusion that, when giving the employees these forms, Miller planned to convert Sells' status to that of a permanent member of the warehouse crew and thereafter assist him in furthering his college education.* After the meeting, however, Sells' apparent enthusiasm for joining the Independent waned. When Wyatt learned of this development he expressed his strong displeasure and saw fit to point out that Sells was a likely candidate for layoff.

The employee was not dissuaded by this obvious threat and told Hyatt that he would not sign a card in the Independent even if it meant that he might loss his job. Not long thereafter the Brewery Workers filed additional charges against the Respondent. On November 8, Hyatt left the warehouse with the announcement that he had to report to the Labor Board and that when he got back things would not be the same. Upon his return, Hyatt put the men to work on additional duties that kept them at the warehouse considerably past their normal hours. The next morning Hyatt told employee Rideaux that Sells was "the brains of the AFL-CIO" and that he was "going to cut Albert [Sells] loose." Shortly thereafter that day Sells was terminated.

Mr. Miller testified that at Hyatt's suggestion, on the morning of November 9, Sells was called into his office. According to the Respondent's president, when Sells reported, he was told, in the presence of Hyatt and Assistant General Manager James L. Floyd, that because the peak of the beer season was over and Sells was the most recently hired employee, he would have to be the first one laid off.[12] Sells was then given his final paycheck as well as an additional week's pay. *On about November 13, Sells returned to the Respondent's office to ask that he be contacted if any openings arose. The secretary in the office promised to contact him in the event he was needed. Subsequent to Sells' termination, Granger was injured and a replacement was hired temporarily until Granger recovered and was able to return to work. Sells, however, was never contacted and never recalled.*

[12] Although the Respondent contends that it followed strict seniority in laying off Sells, it is significant that its contract with the Independent Union had no seniority provision.

The Respondent contends that Sells was laid off only because a decline in business required that it cut back its warehouse crew. On the other hand, both Miller and Hyatt testified that the "season" in their business extended from March to Labor Day. Hyatt testified that after Labor Day the Respondent needs only one-half the warehouse crew that it employs during the summer. From their own testimony it would appear that if Sells were being dropped because the end of the beer season had arrived he would have been laid off in September. Moreover, the Respondent offered no evidence as to any change subsequent to Labor Day that caused it to keep Sells on the payroll for two additional months. From the evidence set forth above it is my conclusion that Sells was considered an intelligent and valued employee in October who, when it appeared that he was interested in joining the Independent, was considered for a place on the permanent payroll and for further help in connection with his college education. Thereafter, however, when Sells declined to withdraw from the Brewery Workers and join the Independent, Foreman Hyatt reproached him for his vacillation and pointedly referred to the prospect of a layoff in the near future. Even this did not cause Sells to change his ways and a short while later, on November 8, newly filed charges by the Brewery Workers compelled Hyatt to submit to further interrogation by the Labor Board. On November 9, the next day, the foreman described Sells as the "brains of the AFL-CIO" when he would have to "cut loose." That morning Sells was terminated, and never recalled notwithstanding the fact that the Respondent subsequently hired a replacement for Granger. On the basis of the foregoing evidence, it is my conclusion that Sells was dis-

charged because of his persistent adherence to the Brewery Workers and not because of a decline in beer sales, as the Respondent contends. Accordingly, I find that by this action the Respondent violated Section 8(a)(3) and (1) of the Act.

In the context of the discriminatory termination of Sells, it is my further conclusion, and I find, that the Respondent also violated Section 8(a)(1) by the following conduct of Foreman Hyatt:

(a) On about July 18, 1962, Hyatt's threat, uttered to the warehouse employees, that if they remained with the Brewery Workers he would suggest to General Manager Miller that their pay be cut by $10, and Hyatt's prediction, made at the same time, that the Respondent would eliminate free uniforms, that the employees would lose sick leave and vacations, that the Company "would cut every man in the AFL-CIO" and that if the men stayed with the Brewery Workers the Respondent "could easily find a reason for firing [the warehouse employees]."[13]

(b) Hyatt's declaration to the employees, late in July, after they had submitted statements in support of an unfair labor practice charge, that "every day he has to spend in court he would see [the employees] got 2 days off without pay."

(c) Hyatt's interrogation of Sells on October 3 as to why the latter had not signed a card in the Independent Union, and the threat of an impending layoff which Hyatt voiced to the employee in that same conversation.

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[13] The Respondent contends that since none of these threats were carried out, the comments attributed to Hyatt by the employees should not be held a violation of the Act. There is no merit to this contention.

(d) Hyatt's discriminatorily assigning additional duty to the warehouse employees on about November 8 when he returned from a meeting with a representative of the Labor Board.[14]

(e) Hyatt's statement to employee Clifton Rideaux on November 9, that he was "going to cut [Sells] loose" because he thought "Al was the brains of the AFL-CIO." *N.L.R.B. v. Armstrong Tire & Rubber Company*, 228 F.2d 159, 161 (C.A. 5).

(f) Hyatt's comment on February 5, 1963, the eve of the hearing, to an applicant for employment at the warehouse, and in the presence of the employees then on the payroll, that the job seeker leave his name and address "because we might run these boys off tomorrow."

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth in section III, above, appearing in connection with the operations of the Respondent, described in section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

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[14] The additional duty involved, namely, washing windows and cutting the grass around the warehouse, was not unusual and it was, in fact, the type of work which the employees might normally be assigned. On the other hand, prior to Hyatt's departure from the warehouse that day he had prophesied that when he came back "things wasn't going to be the same." As if fulfillment of that prediction, on his return he gave the men these tasks and delayed their normal work of unloading the beer trucks so that all of them were compelled to remain on duty for several additional hours that evening.

V. The remedy

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action of the type conventionally ordered in such cases as provided in the Recommended Order below, which I find necessary to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act. For reasons set forth in *Consolidated Industries, Inc.*, 108 N.L.R.B. 60, 61, and cases there cited, I shall recommend a broad cease and desist order.

Having found that the Respondent unlawfully terminated Albert Sells, on November 9, 1962, I recommend that it offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from the aforesaid date of discharge to the date of the Respondent's offer of reinstatement, with backpay and interest thereon computed in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 N.L.R.B. 289, and *Isis Plumbing & Heating Co., Inc.*, 138 N.L.R.B. No. 97.

Conclusions of Law

1. The Respondent is engaged in commerce and Brewery Workers and Local 253 are labor organizations, all within the meaning of the Act.

2. By discriminating in regard to the hire and tenure of Albert Sells, thereby discouraging membership in the

Brewery Workers and Local 253, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

3. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER

Pearl Beer Distributing Company of Jefferson County, Incorporated, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in any labor organization of its employees by discriminating in regard to their hire, tenure, or any other terms or conditions of their employment.

(b) Directly, or by implication, threatening employees with the withdrawal of existing privileges, or other economic reprisals, to discourage union membership or activity.

(c) Interrogating employees concerning union affiliation or activities in a manner constituting interference, restraint or coercion in violation of Section 8(a)(1) of the Act.

(d) In any other manner, interfering with restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, and Beer Drivers Local 253, AFL-CIO, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, or any other labor organization to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Offer Albert Sells immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay he may have suffered in the manner set forth in "The remedy" section of this Intermediate Report.

(b) Upon request, make available to the Board, or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Post at its warehouse in Beaumont, Texas, copies of the notice attached hereto and marked "Appendix."[15] Copies of said notice, to be furnished by the Regional Director for the Twenty-third Region, shall, after being duly signed by the Repondent's authorized representative, be posted by the Repondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twenty-third Region, in writing, within 20 days from the receipt of this Intermediate Report and Recommended Order what steps it has taken to comply herewith.[16]

Dated at Washington, D. C.

ROBERT E. MULLIN
Robert E. Mullin
Trial Examiner

[15] If this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the future event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[16] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO, and BEER DRIVERS LOCAL 253, AFL-CIO, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO, or any other labor organization, by discharging any of our employees, or in any manner discriminating in regard to their hire or tenure of employment, or any term or condition of employment.

WE WILL NOT directly, or by implication, threaten employees with the withdrawal of existing privileges or with other forms of reprisals, because of their union membership or activities.

WE WILL NOT interrogate employees concerning union affiliation or activities in a manner constituting interference, restraint or coercion in violation of Section 8(a)(1) of the Act.

WE WILL offer to Albert Sells immediate and full reinstatement to his former or a substantially equivalent

position without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay suffered as a result of the discrimination against him.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named unions, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

PEARL BEER DISTRIBUTING COMPANY OF JEFFERSON COUNTY, INCORPORATED
(Employer)

Dated _____ By _____
(Representative) (Title)

NOTE: We will notify Albert Sells if he is presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston, Texas (Tel. No. CApitol 8-6611, Ext. 2711), if they have any question concerning this notice or compliance with its provisions.

APPENDIX B

143 NLRB No. 65 D-5513 Beaumont, Texas

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 23-CA-1460

PEARL BEER DISTRIBUTING COMPANY OF JEFFERSON COUNTY, INCORPORATED

and

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO

Case No. 23-CA-1510

PEARL BEER DISTRIBUTING COMPANY OF JEFFERSON COUNTY, INCORPORATED

and

BEER DRIVERS LOCAL 253, AFL-CIO, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO

DECISION AND ORDER

On May 3, 1963, Trial Examiner Robert E. Mullin issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain

affirmative action as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner with the modification that the words "Preserve and," shall be added to paragraph 2(b) as the beginning words thereof.

Dated, Washington, D. C. July 11, 1963.

Philip Ray Rodgers, Member

John H. Fanning, Member

Gerald A. Brown, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20849

PEARL BEER DISTRIBUTING COMPANY OF JEFFERSON COUNTY, INCORPORATED,
Appellant,

versus

NATIONAL LABOR RELATIONS BOARD,
Appellee.

Petition for Review of an Order of the National Labor Relations Board, Sitting at Washington, D.C.
(Texas Case).

(April 20, 1964.)

Before RIVES, BELL and WRIGHT,* Circuit Judges.

PER CURIAM: Petitioner concedes that the Board has jurisdiction insofar as concerns its driver-salesmen for whom it has bargained as a member of a multi-employer bargaining association. See *N.L.R.B. v. Sightseeing*

*Of the D.C. Circuit, sitting by designation

Guides & Lecturers Union, 2 Cir. 1962, 310 F.2d 40. The Board's order, however, is based upon coercion of warehouse employees and the discharge of one warehouse employee. The multi-employer association has not bargained for warehouse employees, but in oral argument petitioner's counsel states that about half of the members of such association hire warehouse employees. We cannot say that the Board erred in asserting jurisdiction. Substantial evidence on the record as a whole supports the Board's findings.

The Board's order is therefore ENFORCED.

APPENDIX D

§ 152. Definitions

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic

service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

APPENDIX E

JURISDICTION OF NLRB

§407

Jurisdictional Yardsticks Prevailing on August 1, 1959

The NLRB jurisdictional yardsticks prevailing on August 1, 1959, are as follows (the NLRB cannot decline cases meeting these yardsticks; state tribunals may take cases not meeting these tests; key decisions in which the tests were first applied may be located under the decimal reference following each yardstick.):

NON-RETAIL BUSINESSES (.68)—

Jurisdiction will be asserted if the yearly outflow or inflow, direct or indirect, is $50,000.

Direct outflow means goods shipped or services furnished by the employer outside the state.

Indirect outflow means sales within the state to users meeting any jurisdictional standard, except solely the indirect inflow or indirect outflow standard.

Direct inflow means goods or services furnished directly to the employer from outside the state in which he is located.

Indirect inflow means the purchase of goods or services which originated outside the employer's state, but which he purchased from a seller within the state.

Direct and indirect outflow can be combined to meet the $50,000 requirement.

Direct and indirect inflow can be combined to meet the $50,000 requirement.

Outflow and inflow cannot be combined to meet the $50,000 requirement.

(The 1954 standards were $50,000 direct outflow, $500,000 direct inflow, $100,000 indirect outflow, and $1,000,000 indirect inflow.)

OFFICE BUILLDINGS (.96)—

Jurisdiction will be asserted if—

(1) Gross yearly revenue is $100,000, and
(2) $25,000 of the revenue is derived from organizations which meet any of the jurisdictional yardsticks, except the $50,000 indirect outflow and indirect inflow tests for non-retail businesses.

(The 1954 standards required an employer who leased or owned and who operated a building to be otherwise engaged in commerce and to utilize the building primarily to house his own offices.)

RETAIL CONCERNS (.77)—

Jurisdiction will be asserted if the gross yearly volume of business is $500,000.

(The 1954 standards were direct inflow of $1,000,000, or indirect inflow of $2,000,000, or direct outflow of $100,000.)

INSTRUMENTALITIES LINKS AND CHANNELS OF INTERSTATE COMMERCE (.85)—

Jurisdiction will be asserted if—

(1) $50,000 yearly revenue is derived from the interstate (or linkage) part of the enterprise, or
(2) $50,000 yearly revenue is derived from services performed for employers meeting any of the jurisdictional yardsticks, except the $50,000 indirect outflow and indirect inflow tests for non-retail businesses.

(The 1954 standards had a dollar test of $100,000).

PUBLIC UTILITIES (.91)—

Jurisdiction will be asserted if—

(1) Gross yearly volume of business is $250,000, or
(2) Standard for non-retail businesses is met, namely, yearly outflow or inflow, direct or indirect, of $50,000.

(The 1954 standards required of local retail public utilities a gross yearly business of $3,000,000.)

TRANSIT SYSTEMS, EXCEPT TAXICABS (.93)—

Jurisdiction will be asserted if the gross yearly volume of business is $250,000.

(The 1954 standards had a dollar test of $3,000,000 for local transit systems.)

TAXICAB FIRMS (.58)—

Jurisdiction will be asserted if the standard for retail concerns is met, namely, gross yearly volume of business of $500,000.

(Under the 1954 standards, jurisdiction was not asserted over taxicab firms operating wholly within a state.)

NEWSPAPERS (.90)—

Jurisdiction will be asserted if—

(1) Gross yearly volume of business is $200,000; and
(2) Newspaper holds membership in or subscribes to interstate news service, publishes nationally syndicated features, or advertises nationally sold products.

(The 1954 standards had a dollar test of $500,000 and required some interstate connection.)

COMMUNICATION SYSTEMS (RADIO, TELEVISION, TELEGRAPH AND TELEPHONE (.88, .89)—

Jurisdiction will be asserted if the gross yearly volume of business is $100,000.

(The 1954 standards had a dollar test of $200,000.)

NATIONAL DEFENSE (.75)—

Jurisdiction will be asserted if there is a substantial impact on national defense.

(The 1954 standards required $100,000 yearly in goods or services to be furnished for national defense pursuant to government contract.)

HOTELS AND MOTELS, OTHER THAN RESIDENTIAL (.53)—

Jurisdiction will be asserted if the gross yearly volume of business is $500,000; hotel or motel must receive more than 25 percent of its rental income from, or rent more than 25 percent of its rental units to, transient guests who stay for periods of less than one month.

(The 1954 standards contained no test for hotels or motels, since the Board had a policy at that time of declining jurisdiction over hotels as a class.)

BUSINESS IN TERRITORIES (.18) AND DISTRICT OF COLUMBIA (.16)—

Plenary jurisdiction will be asserted over all employers engaged in any business within District of Columbia, even if business is purely local in character.

(The 1954 standards were the same.)

Although the NLRB has plenary power to exercise jurisdiction over all local as well as interstate commerce in Territories, jurisdiction will only be asserted over enterprises which meet NLRB standards.

(Plenary jurisdiction was asserted until 1955; standards were applied thereafter.)

EMPLOYER ASSOCIATION (.3472)—

Regarded as single employer for jurisdictional purposes. (The 1954 standards were the same.)

How jurisdictional amount is computed—The following general guides govern the computations in determining whether the jurisdictional amounts stated in the yardsticks are satisfied.

APPENDIX F

United States of America
Before The National Labor Relations Board

SABINE DISTRICT WHOLESALE BEER DISTRIBUTORS ASSOCIATION, INC.[1]

Employer

and Case No. 23-RC-1930

BEER DRIVERS LOCAL 253, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO, and INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO[2]

Petitioner

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[1] The name of the Association appears as amended at the hearing. The Association is comprised of the following employer-members: Beaumont Falstaff Distributors, Incorporated; Clark Distributing Company; Dr. Pepper Bottling Co. of Orange, Inc.; Felder Falstaff Distributor, Incorporated; Giglio Distributing Company; Jax Beer Distributors of Beaumont, Incorporated; Jax Valley Beer Company, d/b/a Jax Valley Beer Company of Port Arthur; Lone Star Beer Distributors of Beaumont, Incorporated; Lone Star Beer Distributors of Port Arthur, Incorporated; O. Del Papa and Sons Pearl Distributing Company of Jefferson County, Incorporated; and Sabine Falstaff Distributors, Incorporated. Thomas Distributing Company was formerly a member of the Association but withdrew from membership therein in December, 1961.

[2] The Petitioner moved at the hearing that it appear on the ballot as Beer Drivers Local 253, International Union of United Brewery, Flour, Cereal, Soft drink and Distillery Workers of America, AFL-CIO, omitting the name of the International. In accordance with standard Board practice, and as there will be no difficulty in allowing the full name of the Petitioner on the ballot, the Petitioner's name will appear on the ballot as shown above.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. His rulings made at the hearing are free from prejudicial error and are affirmed.

Pursuant to Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers herein to the undersigned Regional Director.

Upon the entire record, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization(s) named below claim(s) to represent certain employees of the Employer.

[illegible]The Hearing Officer permitted the Beer Salesmen of the Sabine District to intervene on the basis of its current contract with the employer-members of the Association. The Petitioner refused to stipulate that this organization is a labor organization within the meaning of the Act, contending that the members of the Beer Salesmen voted at a special meeting on June 20, 1962, called for such purpose, to affiliate with the Petitioner. The record reflects that a majority of the members did vote at such meeting to affiliate with the Petitioner. However, the record further shows that the Beer Salesmen has been continued in effect by remaining members, has elected a new officer to replace the disaffiliating one, and is continuing to service the said contract. Accordingly, I find the Beer Salesmen of the Sabine District is not defunct. **Hebron Brick Company**, 135 NLRB No. 16. As the record shows it is an organization which exists for the purpose of representing employees in negotiations with employers in respect to wages, hours and working conditions, I find it is a labor organization as defined in the Act.

The Petitioner further contends that intervention is permitted only upon an independent showing of interest by the Beer Salesmen. For the purposes of intervention, I find that the Beer Salesmen of the Sabine District has at least a colorable interest in

3. A question affecting commerce exists concerning the representation of certain employees of the Employer, within Section 9(c)(1) and Section 2(6) and (7) of the Act.[1]

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certain of the employees involved accordingly I find Petitioner's contention to be without merit. See **W. Horace Williams Company**, 120 NLRB 223, fn. 2; see also **John St. George, d/b/a Michele Frocks**, 121 NLRB 1273, 1274.

[1] The Employer and the Intervenor contend that their contract constitutes a bar to the instant petition and urge the custom and practice in the industry of long term contracts as constituting a recognized exception to the usual 2-year rule. The record shows that separate but identical contracts were entered into by all of the above-named members of the Association, or their predecessors in business, with the Intervenor on February 11, 1960, except for Dr. Pepper Bottling Co. of Orange, Inc., whose contract was executed on February 15, 1960. All of these contracts are effective from January 1, 1960 for a period of three years. Thomas Distributing Company executed a contract with the Intervenor on June 25, 1962, identical to those executed by the members of the Association, including the provision that such "agreement shall remain in full force and effect for a period of three years from and after January 1, 1960".

The Board established the rule in **Pacific Coast Association of Pulp and Paper Manufacturers**, 121 NLRB 999, that "any contract having a fixed term in excess of two years shall be treated, for the purposes of contract bar, as a contract for a fixed term of two years, notwithstanding that fact that a substantial part of the industry of which the contracting employer is a part may be covered by contracts for a longer term," and expressly abandoned the industry test urged here by the Employer and the Intervenor. Accordingly, I find that the contracts of the employer-members of the Association do not constitute a bar to the instant petition. Nor is the contract entered into between Thomas Distributing Company and the Intervenor a bar as to that employer. Although this contract was not entered into until June 25, 1962, it is, by its terms, effective on January 1, 1960, and the Board has held that the two-year period during which a contract is operative as a bar runs from its effective date. **Benjamin Franklin Paint and Varnish Company**, 121 NLRB 51, 56.

The Employer apparently contends that the instant petition should be dismissed because the incumbent Beer Salesmen have never been decertified. No decertification petition, as provided for in the Act and the Board's Rules and Regulations, has been filed

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining

relative to such labor organization, and the question concerning the representation of the employees sought by the Petitioner pursuant to Section 9 (c) (1) (A) (i) of the Act and the Board's Rules and Regulations does not depend upon a prior decertification of the incumbent labor organization. Accordingly, I find this contention to be without merit.

The Intervenor contends that the Petitioner is attempting "to take over a legal, valid and subsisting Union through illegal methods" and seeks to have the petition denied on this ground. The record shows nothing more than that a representative of the Petitioner encouraged members of the Intervenor to affiliate with Petitioner and assisted these membrs in their efforts to effect an affiliation of that labor organization with the Petitioner. I have already found that for Board purposes the Beer Salesmen of the Sabine District is not a defunct labor organization, and the legality of the action taken at the June 20 meeting need not be resolved here. **Aluminum Company of America,** 90 NLRB 1342, 1343. I do not hereby indicate any opinion with respect to the finality of the action or the legal effect thereof taken by the members of the Beer Salesmen of the Sabine District on June 20, 1962. **Aluminum Company of America,** supra; **Aleo Manufacturing Company,** 109 NLRB 1297, 1303, fn. 20. As the record does not reflect that the Petitioner in its organizing campaign engaged in acts of the character which would bar the instant petition, nor has the Intervenor offered any proof of such acts, I find the Intervenor's contention in this respect to lack merit.

Counsel for the Employer, over the Petitioner's protest, was permitted by the Hearing Officer to intervene at the hearing on behalf of Thomas Distributing Company. The Employer contends, contrary to the Petitioner, that Thomas is properly a part of the multi-employer group to which the parties otherwise agree. The record shows that only Thomas withdrew from membership in the Association in December of 1961, that it signed an agreement with the Intervenor on June 25, 1962, identical to those entered into between the employer-members of the Association and the Intervenor approximately two and one-half years before, and that Thomas is apparently abiding by such agreement. The Board has held that the mere adoption of contracts affords insufficient basis for inclusion of a firm in a multi-employer unit. **Dittler Bros. Inc., et al,** 132 NLRB 441, 445 fn. 2. Accordingly, as the unit found appropriate for multi-employer bargaining purposes and that such a unit concerning representation exists as to the employees of Thomas Distributing Company.

within Section 9 (b) of the Act.[5]

[5] The employer-members of the Association are engaged in the wholesale distribution of beer in Texas to retail outlets. All of the parties are in agreement that a multi-employer unit is appropriate. There is, however, disagreement between them as to the classifications of employees to be included in such unit. The Petitioner seeks a unit composed of driver salesmen, helpers and warehousemen, whereas the Employer and the Intervenor would limit the unit to driver salesmen. They contend that the unit sought by the Petitioner is not appropriate for multi-employer bargaining purposes and that such a unit is not stable. The grounds for the contention that the unit sought by Petitioner is inappropriate are, in effect, that there is a lack of community of interest among the employees sought, and the bargaining history concerning such employees. The contention that the unit is not stable is based upon an alleged high rate of turnover among helpers and warehousemen and the casual nature of their employment. The Employer also insists that the helpers are the employees of the driver salesmen rather than of the distributors.

The record shows and the Employer admits that one of the distributors, Sabine Falstaff Distributors, Incorporated, employs a driver salesmen helper. Testimony at the hearing reflects that although in all instances the helpers are hired by and subject to discharge by the driver salesmen and that the helpers' wages are in general deducted from the driver salesmen's pay that in the instances of Clark Distributing Company, Felder Falstaff Distributor, Incorporated, Jax Beer Distributors of Beaumont, Incorporated, O. Del Papa and Sons, and Pearl Beer Distributing Company of Jefferson County, Incorporated, the helpers are paid on company payroll checks; that these employers deduct social security and withholding tax from the helpers' pay and carry them on the company records; that the helpers are covered by workmen's compensation insurance; and in the case of three of these employers the helpers wear uniforms furnished at least in part by the respective employers. Although there was little testimony in the record concerning the actual element of control and supervision of the helpers, representatives of two of these employers testified respectively that before a helper would be fired by the employer it would be discussed with the driver salesman, and that the helpers, together with the driver salesmen and warehousemen, were under the supervision of the sales manager. Based upon the foregoing and the entire record, I find the helpers used by the driver salesmen of the above-named employers are employees of said employers. **Wells Dairies Cooperative**, 107 NLRB 1150, 1151

All driver-salesmen and helpers employed by the employer-members of Sabine District Wholesale Beer Distributors Association, Inc., at their respective places of

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As the only testimony offered at the hearing bearing directly on the duration of these helpers' employment shows that the drivers keep the same helpers and have had them a long time, and as there is no showing that these helpers are mere casual employees or that their rate of turnover is high, I shall include them in the unit herein found appropriate. However, as the record reflects that the helpers utilized by the driver salesmen of the other employer-members of the Association do not meet the above criteria establishing them as employees of such employers, I shall exclude those helpers from the unit.

Insofar as the Employer and the Intervenor contend that the unit petitioned for is inappropriate because of a lack of community of interest among the three classifications of employees, the Board's decision in **Plaza Provision Company**, 131 NLRB No. 101, is controlling as to the warehousemen. Although testimony at the hearing was meager as to the duties of the driver salesmen, helpers and warehousemen, or as to the sales and distribution policies and practices of the employers involved, it is apparent and I conclude from the record as a whole that the driver salesmen here are essentially engaged in selling their employers' products and calling upon the trade. Thus, according to the testimony and to the contracts received in evidence, the provisions of which all witnesses testified are being observed by the employers and the driver salesmen, it appears that the driver salesmen sell and deliver beer to retail stores and collect payment therefor; they have no specified hours of work; they call upon the trade, and are paid a minimum weekly salary plus varying rates of commission on cases and kegs of beer sold. Although there does not appear to be any interchange between the three classifications of employees, the record shows that driver salesmen together with helpers and warehousemen, where these classifications are employed, load and unload trucks. In addition to the showing that helpers help the driver salesmen load and unload trucks and their employment depends in part at least upon the volume of sales, it is also apparent from the record as a whole, and I find, that the helpers accompany the driver salesmen on their routes and otherwise perform the usual duties of their classification. Accordingly, I find that there is a close community of interest between the driver salesmen and

business in Beaumont, Port Arthur, and Orange, Texas, but excluding warehousemen, all other employees, guards, watchmen, and supervisors as defined in the Act.

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their helpers. The warehousemen's duties are to load and unload trucks, keep the warehouse clean, and in the case of one employer its warehousemen are used to make "hot shot" deliveries. The warehousemen are paid on an hourly basis. I find that the interests of the warehousemen are diverse from those of the driver salesmen and I shall exclude them from the requested unit. **Plaza Provision Company**, supra; **E. H. Koester Bakery Co., Inc.**, 136 NLRB No. 100. However, I do not construe these cases to require the exclusion of the helpers here. In neither of these cases were helpers of driver salesmen involved, nor does **Plaza Provision Company** in overruling **The Valley of Virginia Cooperative Milk Producers Association**, 127 NLRB 785, and **Don Kerr, Inc.**, 129 NLRB 526, to the extent inconsistent therewith, hold by inference that a unit of driver salesmen and their helpers is inappropriate, and the Board has repeatedly held appropriate units including driver salesmen and their helpers. **Wells Dairies Cooperative**, supra; **Norfolk Coca-Cola Bottling Works, Incorporation**, 123 NLRB 641.

The record shows that there has been a history of group collective bargaining, based upon recognition, by the distributor members of the Association with the Beer Salesmen reaching back to 1948. The Association itself, as the record shows, is not the authorized bargaining agent for its distributor members. Rather the Association has limited its function in the collective bargaining process to furnishing legal counsel to the negotiating committee composed of representatives from each of the distributor members. The committee has bargained with the Beer Salesmen, and the record shows that such bargaining has resulted in the distributor members signing separate but identical contracts with the Beer Salesmen covering units of each of the distributors' driver salesmen. There has been no bargaining by the distributors, either on a multi-employer basis or in a single-employer basis, for any other employees but the driver salesmen. In the course of such bargaining some four or five contracts have been negotiated, the current one being presently effective as described above. Prior to the recognition of the Beer Salesmen, the distributors as a group dealt with the Teamsters for approximately three years. These dealings were also based on recognition of that organization as the representative of its driver salesmen by the dis-

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before

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tributors and multiple contracts were apparently entered into between the distributors and the Teamsters. As noted above, the employer and the Intervenor contend that the helpers should be excluded from the unit sought by the Petitioner because of such bargaining history. The Board has held that a prior history of collective bargaining as to the classifications of employees to be included in an appropriate unit is not controlling where a close community of interesst exists between a group of previously unrepresented employees and a unit of represented employees and a labor organization presently seeks to include the represented employees in a unit with the represented employees. **Bronx County News Corporation,** 89 NLRB 1567. All of the parties here agree that the multi-employer unit is appropriate, and as the multi-employer unit sought here by the Petitioner is coextensive with the multi-employer unit for which there has been an extensive pattern of bargaining, I find the Employer's and Intervenor's contention in this respect to be without merit. See Twenty-Second Annual Report of the National Labor Relations Board, p. 31.

Although the unit found appropriate is broader than that requested by the Intervenor, I am satisfied that the Intervenor has the requisite showing of interest therein. In the event that the Intervenor does not wish to participate in the election directed herein, I shall permit it to withdraw upon notice to the Regional Director within ten days from the date of the issuance of this Decision and Direction of Election. **J. R. Simplot Co.,** 130 NLRB 272.

the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether (or not) they desire to be represented for collective bargaining purposes by Beer Drivers Local 253, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, and International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, or by Beer Salemen of the Sabine District, or by neither.

Dated: September 21, 1962
at Houston, Texas

(Signed) By: CLIFFORD W. POTTER
Clifford W. Potter
Regional Director for the 23rd Region.

APPENDIX G

Beaumont, Port Arthur,
and Orange, Texas

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SABINE DISTRICT WHOLESALE BEER DISTRIBUTORS ASSOCIATION, INC.
Employer

and

Case No. 23-RC-1930

BEER DRIVERS LOCAL 253, INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO, AND INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO
Petitioner

DECISION ON REVIEW

On September 21, 1962, the Regional Director for the Twenty-third Region issued a decision in the above-entitled proceeding directing an election in an association-wide unit of driver-salesmen and helpers. Thereafter, the Employer, also referred to herein as Association, and the Intervenor, Beer Salesmen of the Sabine District, in accordance with Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, filed with the Board timely requests for review contending, *inter alia*, that helpers should be excluded from the unit. The Board, by telegraphic order dated January 3, 1963, granted the requests for review with respect to the issue raised con-

cerning the unit placement of the helpers and denied the requests in all other respects.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Employer is a trade association comprised of eleven employer-members[1] which are engaged in the wholesale distribution of beer to retail outlets. The employer-members who employ driver-salesmen to deliver beer and solicit sales have recognized the Intervenor for 40 years as the bargaining representative of the driver-salesmen in an association-wide unit. However, driver-salesmen helpers have been excluded from this unit and are unrepresented. On July 10, 1962, the Petitioner filed the instant petition seeking to represent the driver-salesmen and their helpers in the same unit. In his decision, the Regional Director included the helpers of certain of the employer-members as he found that they shared sufficient community of interests with the driver-salesmen to include the two classifications together in the same unit. In their requests for review of this determination, the Association and the Intervenor seek to preserve their contractual unit, contending that the helpers should be excluded. All parties agree that the appropriate unit should be association-wide in scope.

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[1] Beaumont Falstaff Distributors, Incorporated; Clark Distributing Company; Dr. Pepper Bottling Co. of Orange, Inc.; Felder Falstaff Distributor, Incorporated; Giglio Distributing Company; Jax Beer Distributors of Beaumont, Incorporated; Jax Valley Beer Company, d/b/a Jax Valley Beer Company at Port Arthur; Lone Star Beer Distributors of Beaumont, Incorporated; Lone Star Beer Distributors of Port Arthur, Incorporated; Orange Pepsi and Stout Pearl Beer Distributor Company of Jefferson County, Incorporated; and Stout-Falstaff Distributors, Incorporated.

The record shows that the helpers at the establishment of six of the employer-members[2] are employed on a regular basis to assist the driver-salesmen on their routes. Although the driver-salesmen hire their helpers and direct them in their work, the helpers at all six employer-members are paid by company check from which social security and withholding taxes are deducted by the employer-members. The helpers at all six employers are likewise covered by workmen's compensation. The wages of the helpers at four of the six employer-members are deducted from the pay of the driver-salesmen, but the fifth concern, Pearl Beer Distributing Company, contributes $15.00 a week toward the pay of each of its helpers. At the sixth employer-member, Sabine Falstaff, the helpers' entire wages are paid by the company. Two employer-members also provide uniforms for the helpers at company expense.

In view of these circumstances, we find, in agreement with the Regional Director, that the helpers involved herein are employees of the six above-named employers[3] and share sufficient community of interests with the driver-salesmen heretofore included within the historical unit to warrant the inclusion of the helpers in the same unit

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[2]Clark Distributing Company; Feider Falstaff Distributor, Incorporated; Jax Beer Distributors of Beaumont, Incorporated; O Del Papa and Sons; Pearl Beer Distributing Company of Jefferson County; and Sabine Falstaff Distributors, Incorporated.

[3]We find, also in accord with the Regional Director, that the helpers employed by other members of the Association are casual employees which we shall therefore exclude from the above appropriate units. **Pepsi Cola Bottling Company of Chattanooga, Inc.**, 132 NLRB 1411.

with the driver-salesmen.[4] However, in view of the bargaining history, we also find that the driver-salesmen and the helpers may each also constitute separate appropriate units. Consequently, as the Intervenor does not seek to add the helpers to the historic unit represented by it, but desires to participate in an election only in that unit, we shall not make a final unit determination at this time. Accordingly, we shall follow Board policy prescribed in similar circumstances[5] and direct separate elections in the following 2 voting groups of employees at the Employer's Beaumont, Port Arthur, and Orange, Texas, establishments, as described below, excluding from each group warehousemen, all other employees, guards, watchmen, and supervisors as defined in the Act.

Group (1) - Existing unit: All driver-salesmen excluding the employees in voting group (2).

Group (2) - Unrepresented unit: All helpers excluding the employees in voting group (1).

In the event a majority of the employees in voting group (1) selects the Intervenor, we find that they constitute an appropriate unit. In these circumstances, if a majority of voting group (2) selects the Petitioner, we find that group also constitutes a separate appropriate unit.

[4] **Wells Dairies, Cooperative**, 101 NLRB 1170. See also, **Pepsi Cola Bottling Company of Chattanooga**, supra; **Hoffman Cigar Co., Inc.**, 133 NLRB 756.

[5] **Felix Haff & Brother, Inc.**, 132 NLRB 1523 (Members Rodgers and Leedom dissenting). Member Rodgers, for the reasons set forth in **Waikiki Biltmore, Inc.**, 127 NLRB 82, and the dissenting opinion in **Felix Haff & Brother, Inc.**, would not pool the votes herein.

If a majority of the employees in the existing unit do not vote for the Intervenor, we shall include the employees in the 2 voting groups in a single overall unit which, under the circumstances, we find to be appropriate, and we shall pool their votes.[6] The Regional Director is instructed to issue a certification of representatives as decided by the results of the election.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among the employees in the above appropriate units as early as possible, but not later than 30 days from the date below. The Regional Director for the region where this case was heard shall direct and supervise the elections subject to the Board's Rules and Regulations. Eligible to vote are those who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged

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[6] If the votes are pooled, they are to be tallied in the following manner: The votes for the Intervenor shall be counted as valid votes, but neither for nor against the Petitioner which is seeking the more comprehensive unit. All other votes are to be accorded their face value, whether for representation by the Petitioner or for no union.

for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective-bargaining purposes by Beer Drivers Local 253, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, and International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO; or by Beer Salesmen of the Sabine District; or by neither.

Dated, Washington, D.C. Apr. 22, 1963.

Frank W. McCulloch, Chairman

Philip Ray Rodgers, Member

John H. Fanning, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PEARL BEER DISTRIBUTING COMPANY OF JEFFERSON COUNTY, INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 20,849

DECREE

Before: Rives, Bell and Wright,* Circuit Judges

BY THE COURT:—

This CAUSE came on to be heard upon the petition of Pearl Beer Distributing Company of Jefferson County, Incorporated, to review and set aside a certain order of the National Labor Relations Board issued against the Petitioner, on July 11, 1963, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on April 13, 1964, and has considered the briefs and the transcript filed in this cause. On April 20, 1964, the Court being fully advised in the premises, handed down its decision enforcing the order of the National Labor Relations Board.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the

National Labor Relations Board in said proceeding be enforced, and that Pearl Beer Distributing Company of Jefferson County, Incorporated, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

*Of the D. C. Circuit, sitting by designation.

Entered: May 1, 1964

(ORIGINAL FILED—MAY 1, 1964)

AFFIDAVIT OF SERVICE

I, John H. Benckenstein, of counsel for petitioner do hereby certify that service of a copy of the foregoing petition for a writ of certiorari has been made on respondent by mail in accordance with Rule 33 of the Rules of this Court. Dated this 16 day of June 1964.

John H. Benckenstein
Attorney for Petitioner